

***United States Court of Appeals  
for the Second Circuit***



**PETITION FOR  
REHEARING**



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9/5

77-1478

77-1478, 77-1479

In The  
UNITED STATES COURT OF APPEALS  
For the Second Circuit

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

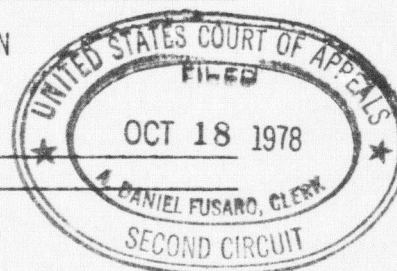
-VS-

DANIEL LEE RUCKER and  
EUGENE C. SMITH,

Defendants-Appellants.

Appeal from a Judgment of Conviction in the  
United States District Court for the Western  
District of New York at 76-181

PETITION FOR REHEARING WITH A SUGGESTION  
FOR REHEARING EN BANC ON BEHALF OF  
APPELLANT, DANIEL LEE RUCKER



*David G. Larimer*

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Attorney for Defendant-Appellant,  
Daniel Lee Rucker  
800 Reynolds Arcade Building  
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UNITED STATES COURT OF APPEALS  
SECOND CIRCUIT

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|---------------------------|---|-------------------|
| UNITED STATES OF AMERICA, | : |                   |
| Plaintiff-Appellee,       | : | <u>DOCKET NO.</u> |
| -vs-                      | : | 77-1478           |
|                           | : | <u>77-1479</u>    |
| DANIEL LEE RUCKER and     | : |                   |
| EUGENE C. SMITH,          | : |                   |
| Defendants-Appellants.    | : |                   |

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PRELIMINARY STATEMENT

This Petition is submitted on behalf of the Defendant-Appellant, Daniel Lee Rucker, pursuant to Rules 40 and 35 of the Federal Rules of Appellate Procedure. Appellant Rucker hereby moves for a rehearing of the case, which was previously argued on May 23, 1978, and decided by opinion on September 28, 1978, and Appellant Rucker further moves for a rehearing en banc of this appeal on the grounds that the panel decision, as evidenced by its Decision dated September 28, 1978, misapplies and fails to enforce the principles established by this Court in United States v. Martin, 525 F2d 703 (1977) and United States v. Floyd, 555 F2d (1977).

The panel also failed to properly apply the principles of law established by the Second Circuit and the Federal Rules of Evidence in affirming the trial court's decision to admit, in the Government's direct case, Appellant Rucker's prior conviction for bank robbery of the exact same bank as charged in the indictment.

As to the argument that the panel decision failed to properly



apply the principles of the Martin and Floyd cases on the interest of the defendant, Appellant Rucker hereby adopts and incorporates by reference the argument made by Appellant Smith in his moving papers dated October 11, 1978, for a Petition for a Rehearing.

Based on the panel decision's opinion in this case of September 28, 1978, in Appellant Rucker's view it is incumbent on the Court to grant a rehearing, and it seems appropriate that this Court consider this case en banc because of the significant conflict between this Decision and prior case law.

Appellant Rucker contended repeatedly at trial and on appeal that it was a reversible error for the trial court to admit evidence of Rucker's prior conviction for the bank robbery of the same bank for which he was on trial in the instant case. In the Appellant's view, the trial court clearly abused discretion in this matter under the case law and under Rules 403 and 404(b) of the Federal Rules of Evidence. Certainly, the probative value of this proffered evidence was very slight, while the prejudicial character of it was extreme.

As the Court said in United States v. James, 555 F2d 992, 1000 (D.C. Cir., 1977), quoting from United States v. Phillips, 401 F2d 301, 305 (7th Cir., 1968):

"Evidence of a prior crime is always . . . prejudicial to a defendant. It diverts the attention of the jury from the questions of the defendant's responsibility for the crime charged to the improper issue of his bad character."

As pointed out at trial, and in our original Appellate Brief,



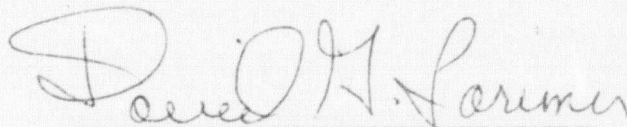
it is difficult to imagine upon what theory the Government based use of Rucker's prior conviction, except to show his bad character. Based on the facts surrounding the instant case and what little there is to learn from the facts surrounding the prior conviction, the Government cannot claim that the crimes are so similar as to constitute the same modus operandi. In the instant case, there was no similarity either in the planning or execution of the two separate robberies. The fact that the same bank was the target bank in Count 1 on the instant indictment and in the crime for which Rucker was previously convicted, is not the same type of "similarity" which justifies the admission of Rucker's prior conviction.

Even if the evidence of prior crimes here is arguably admissible, for some legitimate purpose, the trial court should have exercised its discretion in view of the highly prejudicial nature of the testimony. It must be obvious to all that a conviction for robbing the exact bank for which Appellant Rucker was on trial was highly prejudicial and must have significantly affected the jury's verdict. This is especially so in this case where the Government's case was not overwhelming and based almost entirely upon the testimony of accomplices. If the balancing tests of the probative value and the prejudicial effect is to mean anything, this Court should now clearly establish that here the trial court erred in its admission of the evidence since the prejudicial effect is so great that the jury would have extreme difficulty in dispassionately considering the facts of the case. Appellant Rucker refers to and hereby incorporates by reference its argument made on this point, at pages 17-24 of Appellant Rucker's original Brief on Appeal.

CONCLUSION

WHEREFORE, Appellant Rucker respectfully suggests that a re-hearing should be granted in this case for the above-referenced reasons and also that this Court ought sit en banc to determine the issues raised above, in light of prior case law in this Circuit.

Dated: October 12, 1978

A handwritten signature in cursive script, reading "David G. Larimer". The signature is written in dark ink and is positioned above the printed name and title.

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UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-VS-

DANIEL LEE RUCKER and  
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Defendants-Appellants.

AFFIDAVIT OF PERSONAL  
SERVICE

77-1478, 77-1479

STATE OF NEW YORK )  
COUNTY OF MONROE ) SS.:  
CITY OF ROCHESTER )

Renee J. Jerva, being duly sworn, deposes and says: That I am not a part to this action and that I personally served, by delivering two (2) copies of the Petition for Rehearing with a Suggestion for Rehearing En Banc, to the United States Attorney's Office, 100 State Street, Rochester, New York, leaving copies of said Petition with Eugene Welch, Asst. U.S. Attorney this 12th day of October, 1978.

Renee J. Jerva  
Renee J. Jerva

Sworn to before me, this 12th  
day of October, 1978.

Deborah M. Shaw  
Notary Public

DEBORAH M. SHAW  
NOTARY PUBLIC, State of N.Y., Monroe County  
My Commission expires March 30, 1979

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